Shapiei bin Zainal Abidin & Ors v Shah Alam Officer in Charge of Police District OCPD & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 21NCVC-74–11 OF 2013
ROZANA ALI JC
14 DECEMBER 2015

Police — Tortious liabilities — Negligence — Plaintiff sued all defendants personally and vicariously for tort of assault and battery and/or negligence in discharging their duties as police officers — Whether fifth to seventh defendants acted reasonably with reasonable cause in discharging firearms that caused death of deceased — Whether fifth to seventh defendants negligence in their action — Whether first to fourth defendants vicariously liable

Tort — Negligence — Police officer — Plaintiff sued all defendants personally and vicariously for tort of assault and battery and/or negligence in discharging their duties as police officers — Whether fifth to seventh defendants acted reasonably with reasonable cause in discharging firearms that caused death of deceased — Whether fifth to seventh defendants negligence in their action — Whether first to fourth defendants vicariously liable

The plaintiffs as the administrators of estate of the first, second and third deceased brought the present action against the defendants for alleged assault and battery; public misfeasance and/or negligence in carrying out their duties; arising from the fatal gunshot wound discharged by the fifth to seventh defendants. The plaintiffs also claimed that the first to fourth defendants were vicariously liable for the acts of the fifth to eleventh defendants. Based on the post mortem report, the plaintiffs alleged that the defendants had without lawful excuse or justification fatally shot the deceased in an 'executing style' of shooting, thus liable for the tort of assault and battery. The plaintiffs also submitted that the factual matrix as emerged from the evidence given by the defence witnesses showed that the defendants had failed to establish the defence of reasonable force or self defence. In defence, the fifth to seventh defendants submitted that they had no way of escape when the first, second and third deceased attacked them with 'parang' and they had to take out their guns as a last resort and fired several shots toward the deceased in self defence. The issues for court's determination were: (a) whether the fifth to seventh defendants had acted reasonably with reasonable cause in discharging firearms in accordance with lawful and proper procedure that had caused death whereby an act of the torts of assault and battery and/or negligence was said to have been committed against all the defendants; and (b) whether the first to fourth

defendants were vicariously liable for the act of the fifth to eleventh defendants. A

Held, dismissing the plaintiffs' claim with costs of RM20,000:

(1) Based on the evidence, the defendants and the deceased were in close proximity of each other when their cars collided and came to a full stop after a dramatic car chase. Thus, there were sufficient grounds existed to raise a reasonable suspicion in the minds of the defendants that a seizable offence had been committed following the dramatic car chase that empowered the defendants to arrest and entitled to use all means necessary to effect the arrest and capture (see para 24). B C

(2) The defendants were consistent in their evidence and corroborative of each other in that they had reasonable cause to open fire on the deceased as a last resort in self defence. The defendants were merely exercising their legal rights of self defence and the question of being negligent did not arise at all since they had a reasonable and probable cause to open fire at the deceased. From the evidence, there was no safe or reasonable mode of escape by retreat for the defendants where the defendants had no room except having the necessity of taking life (see paras 26 & 30). D

(3) It was insufficient for the court to rely on the plaintiff's witnesses and the autopsy report to support the plaintiff's supposition. In determining and concluding such supposition, expert witnesses or forensic expert who was the maker of the autopsy report should be called. Where the expert evidence is required on technical matters such as in this case, the court should not decide on such matters in the absence of such evidence (see para 31). E F

(4) Based on the evidence adduced by the fifth to eleventh defendants in totality, the court found that the evidences of the defendants to be credible and believable. The identical narrative and to certain extent had parroted the sequence of events were not the ground which require the court to reject their evidence in toto (see para 34). G

(5) No evidences were adduced to prove that the defendants were in excess of statutory duties or inappropriate manner when discharging their firearm. Since the fifth to eleventh defendants were not liable for assault and battery; public misfeasance or otherwise for negligence, the first to fourth defendants were not vicariously liable as pleaded by the plaintiffs (see para 36). H

[Bahasa Malaysia summary I

Plaintif-plaintif sebagai pentadbir hartanah si mati pertama, kedua dan ketiga memulakan tindakan ini terhadap defendan-defendan atas dakwaan serangan dan serang sentuh; misfeasans awam dan atau kecuaian dalam menjalankan tugas; berbangkit daripada kecederaan tembakan maut yang dilepaskan oleh

defendan kelima hingga ketujuh. Plainitif-plaintif juga mendakwa bahawa defendan pertama hingga keempat bertanggungan secara vikarius bagi tindakan-tindakan defendan kelima hingga ketujuh. Berdasarkan laporan bedah siasat, plaintif mendakwa bahawa defendan-defendan telah, tanpa alasan atau justifikasi yang sah, menembak si mati dalam gaya menembak untuk membunuh, oleh itu bertanggungan bagi tort serangan dan serang sentuh. Plainitif-plaintif juga menghujahkan lagi bahawa fakta matrik yang berbangkit daripada keterangan yang diberi oleh saksi-saksi pendakwaan menunjukkan bahawa defendan-defendan gagal membuktikan pertahanan diri yang munasabah. Dalam pembelaan mereka, defendan kelima hingga ketujuh menghujahkan bahawa mereka tiada cara lain untuk melepaskan diri apabila si mati kedua dan ketiga menyerang mereka dengan parang dan mereka terpaksa mengeluarkan pistol sebagai langkah akhir dan melepaskan beberapa das tembakan terhadap si mati untuk mempertahankan diri. Isu-isu untuk diputuskan oleh mahkamah adalah: (a) sama ada defendan kelima hingga ketujuh telah bertindak munasabah dengan melepaskan tembakan berdasarkan prosedur sah dan teratur yang menyebabkan kematian yang mana dikatakan bahawa tindakan serangan atau serang sentuh telah dilakukan terhadap kesemua defendan; dan (b) sama ada defendan pertama hingga keempat bertanggungan secara vikarius bagi tindakan defendan kelima hingga ketujuh.

Diputuskan, menolak tuntutan plaintif dengan kos RM20,000:

(1) Berdasarkan keterangan, defendan-defendan dan si mati berada berdekatan dengan satu sama lain apabila kereta mereka bertembung dan terhenti selepas kejar-mengejar antara kereta yang dramatik. Oleh itu, terdapat alasan yang cukup untuk membangkitkan syak munasabah dalam minda defendan-defendan bahawa mereka telah melakukan kesalahan berikutan kejar-mengejar dramatik yang memberi kuasa kepada defendan-defendan untuk menangkap dan memberi hak untuk menggunakan apa-apa jua cara yang perlu untuk menangkap dan menahan mereka (lihat perenggan 24).

(2) Defendan-defendan konsisten dalam keterangan mereka dan menyokong satu sama lain dalam hal bahawa mereka mempunyai sebab munasabah untuk melepaskan tembakan terhadap si mati sebagai langkah terakhir mempertahankan diri. Defendan-defendan sekadar menjalankan hak mereka untuk melindungi dan mempertahankan diri dan persoalan cuai tidak timbul sama sekali kerana mereka mempunyai sebab yang munasabah untuk melepaskan tindakan terhadap si mati. Berdasarkan keterangan, tiada cara selamat atau munasabah untuk melepaskan diri dengan cara berundur keranan defendan-defendan tiada ruang lain melainkan melakukan apa yang perlu iaitu dengan mengambil nyawa (lihat perenggan 26 & 30).

(3) Tidak cukup untuk mahkamah bergantung pada saksi-saksi plainitif dan laporan autopsi untuk menyokong anggapan plaintif. Dalam memutuskan dan membuat kesimpulan bagi anggapan sedemikian, saksi-saksi pakar atau pakar forensik yang membuat laporan autopsi tersebut mestilah dipanggil. Jika keterangan pakar diperlukan bagi hal-hal teknikal, seperti dalam kes ini, mahkamah tidak seharusnya memutuskan hal-hal sedemikian tanpa keterangan pakar (lihat perenggan 31).

(4) Berdasarkan keterangan yang dikemukakan oleh defendan kelima dan ketujuh, mahkamah memutuskan bahawa keterangan defendan-defendan kredibel dan boleh dipercayai. Naratif yang sama dan, pada satu tahap, mengulang peristiwa-peristiwa bukanlah alasan yang memerlukan mahkamah menolak keterangan sepenuhnya (lihat perenggan 34).

(5) Tiada keterangan yang dikemukakan untuk membuktikan bahawa defendan-defendan mempunyai kewajipan-kewajipan statutori atau menunjukkan cara yang tidak sesuai apabila melepaskan tembakan. Memandangkan defendan kelima hingga ke-11 tidak bertnggungan bagi serangan dan serang sentuh; misfeasans awam atau sebaliknya, kecuaian, defendan pertama hingga keempat tidak bertanggungan secara vikarius seperti yang diplidkan oleh plaintif-plaintif (lihat perenggan 36).]

Notes

For cases on negligence, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 1513–1516.

Cases referred to

Govinda Raju & Anor v Laws [1966] 1 MLJ 188; [1965] 1 LNS 45, HC (refd)
Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238, HL (refd)
Mahmood v Government of Malaysia & Anor [1974] 1 MLJ 103 (refd)
Patrick Chau Fook Henn v PP [2014] 3 MLJ 825; [2014] 8 CLJ 14, CA (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 184 (refd)
Ramly & Ors v Jaafar [1968] 1 MLJ 209, FC (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Ya bin Daud v PP [1997] 4 MLJ 322; [1996] 2 CLJ 540, HC (refd)

Legislation referred to

Civil Law Act 1956 s 7
Evidence Act 1950 ss 45(1), 103
Federal Constitution art 5(1)
Government Proceedings Act 1956 ss 5, 6
Police Act 1967 ss 3(3), 20

A Public Authorities Protection Act 1948 s 2

Latheefa Koya (Michelle Yesudas with her) (Daim & Gamany) for the plaintiff.
Norliza bt Zulkifli (Kamal Azira, Hani Aziza & Zureen Elina with her) (Senior Federal Counsel, Selangor State Legal Advisor Office) for the defendant.

B

Rozana Ali JC:

INTRODUCTION

C **[1]** The plaintiffs are the administrators of the estate of Muhammad Shamil Hafiz bin Shapiei, (first deceased) Mohd Hairul Nizam bin Tuah (second deceased) and Muhamad Hanafi bin Omar (third deceased). By the writ of summons and amended statement of claim dated 12 August 2014, the plaintiffs claims for general damages and special damages of RM21,000, loss
D for support and expectation of life under s 7 of the Civil Law Act 1956; exemplary and aggravated damages as well as interest and costs for alleged assault and battery; public misfeasance and/or negligence in carrying out their duties; arising from the fatal gunshot wound discharged by the fifth to seventh defendants. The plaintiffs also alleged that the first to fourth defendants are
E vicariously liable for the acts of the fifth to eleventh defendants.

[2] The defendants deny liability on the ground that the fifth to seventh defendants had acted reasonably with reasonable force for the purpose of
F self-defence in accordance with lawful and proper procedure in discharging their firearms.

THE PLAINTIFF'S CASE

G **[3]** On 13 November 2010, at about 4am, at Glenmarie, Shah Alam, the first, second and third deceased were shot in the head and/or chest by the fifth to seventh defendants. All of them succumbed from the said gun shot. At the material time the first deceased was 15 years old, the second deceased was 20 years old and the third deceased was 22 years old.

H

[4] According to the postmortem report, the first deceased received two gunshots one in his head and one in his chest. Both bullets were fired in the identical trajectory of 45 degree to the back and to the right and no defensive wounds were sighted. The postmortem was carried out by Dr Norliza bt
I Ibrahim on 13 November 2010 and the details are as follows:

(a) Muhammad Shamil Hafiz

Tanda-tanda Kecederaan

Kepala dan Leher

1. Luka berbentuk bulat (selaras dengan luka tembakan masuk) pada bahagian dahi di antara kedua-dua kening berdiameter 0.5sm. Terdapat lebam dan luka lelas mengelilinginya, kawasan berukuran 1x1.5sm. Arah tembakan adalah 45 ° ke belakang ke kanan. Ianya tembus di luka no.4

Badan

2. Luka berbentuk bulat pada sebelah kanan dada, 2.5sm dari putting kanan dari tulang tengah dada 7.5sm, berdiameter 0.5sm. Terdapat luka lelas dalam keadaan menyerong pada sisi medial dan inferior (sisi tengah dan bawah) luka tersebut, berukuran 2x1.5sm. Terdapat juga lebam pada keliling luka, berukuran 0.2sm. Arah tembakan adalah 45 ° ke belakang ke kanan. Luka tembakan tersebut tembus keluar pada luka no. 6

[5] According to the postmortem report on the second deceased, Mohd Khairul Nizam received two gunshots at the left side of the head and chest. Both bullets were fired with the identical trajectory inwards, downwards and to the right. The postmortem was carried out by Dr Khairul Azman bin Hj Ibrahim on 13 November 2010. The details of the report are as follows:

(b) Mohd Hairul Nizam bin Tuah

Injuries

The following injuries were noted:

1. Entry gunshot wound, just below left mid-clavicular region, slightly oblique position, measuring 0.8x1.1cm associated with collar abrasion, more prominent over upper left side of the margin. The tract was directed inwards, downwards and to the right.

2. Exit gunshot wound, slightly irregular and averted margin over back of right chest 22cm from right clavicle and 10cm from mid line measuring 1.5cmx0.7cm associated with surrounding bruise

3. Round shape gunshot entry wound over left temporal region associated with collar abrasion measuring 0.8x0.7cm. The wound was 4cm from left ear and 4.5cm from lateral part of left eyebrow. The track was directed right laterally and exit at injury no. 4

4. Irregular exit gunshot wound over right temporal, slightly posteriorly measuring 2x1.5cm. The wound above and slightly posterior to the right ear 6cm apart.

[6] According to postmortem report of the third deceased, Muhammad Hanafi bin Omar, the deceased received three gunshots to his head and chest. All three bullets were fired with the trajectory of 45 upwards to the left and to the back and to the middle. The postmortem was carried out by Dr Norliza bt Ibrahim on 13 November 2010. The details of the report are as follows:

(c) Muhamad Hanafi bin Omar

Tanda-tanda Kecederaan

Kepala dan Leher

1. Luka tembakan berbentuk bulat pada pipi kanan (Selaras dengan luka tembakan masuk), 8sm dari telinga kanan, 6sm dari hidung, 3.5sm bucu luar mata kanan, berdiameter 0.5sm. Arah 45° ke atas dan ke kiri. Terdapat lebam dan luka lelas mengelilinginya berukuran 0.2sm. Tembus di tanda kecederaan no. 3.

2. Luka tembakan berbentuk bulat pada pipi kanan (selaras dengan luka tembakan masuk), di hadapan cuping telinga kanan, 5.5sm dari tanda kecederaan no 1, 1sm dari telinga, 11sm dari hidung, berdiameter 0.5sm. Arah 45° ke atas dan ke kiri. Tembus di tanda kecederaan no. 4.

Badan

3. Luka berbentuk bulat (Selaras dengan luka tembakan masuk) pada sebelah kanan dada, di garis tengah tulang selangka (garis midklavikular), 10sm dari putting kanan, 5sm dari bawah tulang selangka, 8sm dari tengah, berdiameter 0.5sm. Terdapat lebam dan luka lelas mengelilinginya, berukuran 0.2sm. Arah 45° ke belakang dan ke tengah.Tembus di tanda kecederaan no. 6.

[7] On 20 November 2010, the second plaintiff lodged a police report at the Petaling Jaya Police station, bearing the report No BKT JELUTONG/006941/10 regarding the police shooting incident of the first deceased, stating that the first deceased was wrongfully killed by policeman.

[8] On 20 August 2011, the second plaintiff representing the third and fifth plaintiffs lodged a police report at the Petaling Jaya Police Station, bearing the report No BKT JELUTONG/004815/11, based on the postmortem reports received, which stated their grievances regarding the angle in which the deceased were shot.

[9] In view of the post mortem report, the plaintiffs alleged that the defendants had without lawful excuse or justification fatally shot the deceased. The angle of the 45 degree as stated in the post mortem reports demonstrates that it was a close range and of an 'execution style' of shooting. Thus the defendants are liable for the tort of assault and battery.

[10] Alternatively the defendants were negligence in discharging their firearms and had also breached the statutory duties under ss 3(3) and 20 of the Police Act 1967 in contravention of art 5(1) of the Federal Constitution. The particulars of negligence and the breach of statutory duties as per the statement of claim listed below:

(a) Kematian si mati pertama, kedua dan ketiga merupakan akibat daripada kejadian tersebut dan berpunca daripada sifat cuai, terburu-buru, tidak kisah, tidak mengikut prosidur yang betul dan sah dan/atau tanpa justifikasi yang sah dan munasabah daripada Defendan Kelima hingga Kesebelas di dalam tindakan menembak si mati.

(b) Kegagalan untuk melaksanakan pengawasan dan pengawalan ke atas anggota polis ketika melakukan operasi tangkapan.

(c) Kegagalan untuk menyediakan satu system yang selamat untuk mengangkap dan mengendali suspek ketika dalam operasi tangkapan

(d) Melaksanakan tugas mereka dengan cuai, tidak berperhatian dan tidak cekap dengan tanpa perhatian yang wajar terhadap hak untuk hidup (right to life), keselamatan dan kesihatan mati.

(e) Kegagalan untuk memerhati dan bertindak secara konsisten dengan hak-hak undang-undang dan perlembagaan ke atas saspek.

Disebabkan perkara-perkara yang dinyatakan di atas, Plaintif mengalami 'nervous shock' kesusahan mental dan duka yang melampau.

Akibat itu, Plaintif dan estet si mati-si mati telah mengalami kehilangan dan kerugian (loss and damage).

[11] The plaintiffs submitted that the factual matrix as emerged from the evidence given by the defence witnesses shows that the defendants have failed to establish the defence of reasonable force or self-defence. The evidence, inter alia, shows:

(a) that the defence witnesses had provided a narrative that it was inherently incredible with identical retelling of the story to the identical gunshot wounds;

(b) the witnesses had admitted to not even taking aim when shooting the deceased and yet similar 45 degree shots to the bodies were described in the post-mortem report;

(c) the evidence of the investigating officer, DW4 simply accepted the police's evidence without question;

(d) no evidence to connect all the deceased with the alleged robbery at Caltex Petrol Station at Glemarie, Shah Alam; and

(e) it was apparent from the uniform gunshots fired at the deceased, the killings were premeditated and the story regarding the *parang* attack was a complete fabrication. This was a concerted attempt to hide the truth and cover up the case by the defendants. Further the similarities of the defence witnesses' statement cast further doubts on the veracity and the credibility of their evidences.

[12] In the circumstances, the plaintiffs submitted their claim should be allowed with costs.

THE DEFENDANTS CASE

[13] On 12 November 2010 at about 11pm, the fifth to eleventh defendants left the police headquarters (IPD) Shah Alam in two vehicles after being briefed to carry out patrols in Bukit Jelutong and the surrounding area to prevent any criminal activities. At about 4am, at a traffic light near a Caltex Station, they ran into a car which sped off despite of red light. Due to reasonable suspicion, they gave a chase but the car continued to speed and went into the opposite lane. Several warnings were issued but the car refused to stop even though both cars clearly displayed police emblem. Instead the car even pressed against the police cars when they tried to overtake and to end the chase. Finally the car skidded and came to halt. Upon stopping, all the deceased alighted from the car and started to vigorously attack the fifth to seventh defendants with their *parang*. Verbal warnings were given to the deceased to stop attacking the police but were ignored. Due to the non-stop attacks and strikes by the deceased, the fifth to seventh defendants had no choice and was forced to take out their guns as a last resort and fired several shots toward the deceased in self-defence. It is the defendants defence that such an act of firing to the deceased was justifiable and reasonable given the critical condition during the material time.

[14] The defendants submitted that the principle of '*ex turpi causa non oritur actio*' is applicable when the shots were released during the material time as a final act of self-defence since all the deceased were aggressively attacking them using *parang* despite knowing that they were police officers. Thus the shots was fair and reasonable due to the act of the deceased who kept attacking and ignoring the warning by the defendants to stop the action.

[15] The defendants also contended that the principle of '*non fit voluntia injuria*' is applicable in this case because the deceased had deliberately, negligently and at their own risk put themselves in a situation where they knew or should have known the circumstances was dangerous to their life and safety. The defendants further contended that the loss and damages suffered by the plaintiffs are wholly due and/or substantially contributed by the negligence of the deceased. The particulars of contributory negligence on the part of the deceased are as per statement of defence are produced as below:

(a) Memandu dalam keadaan laju untuk mengelakkan diri dari ditahan oleh pihak polis dan enggan memberhentikan kereta sehingga menyebabkan berlaku *'hot pursuit'* di antara simati-simati dan Defendan Kelima sehingga Defendan Kesebelas.

(b) Enggan memberhentikan kenderaan walaupun telah diminta berkali-kali oleh Defendan Kelima sehingga Defendan Kesebelas di mana simati-simati tahu atau sepatutnya tahu ini meletakkan diri mereka dalam keadaan membahayakan.

(c) Meletakkan diri mereka di dalam suasana kekacauan, kelam kabut dan berbahaya dengan menyerang pasukan polis iaitu Defendan Kelima sehingga Defendan Kesebelas.

(d) Enggan berundur dan berhenti dari menyerang Defendan Kelima Defendan Keenam dan Defendan Ketujuh walaupun telah diberi amaran serta dijerit bahawa Defendan Kelima, Defendan Keenam dan Defendan Ketujuh adalah polis dan mencetuskan keadaan yang membahayakan keselamatan Defendan Kelima sehingga Defendan Kesebelas.

(e) Telah menyerang Defendan Kelima, Defendan Keenam dan Defendan Ketujuh dengan menggunakan senjata iaitu parang dan bertindak melibas-libasnya ke arah Defendan Kelima, Defendan Keenam dan Defendan Ketujuh sehingga menyebabkan Defendan Kelima, Defendan Keenam dan Defendan Ketujuh terpaksa melepaskan tembakan sebagai satu langkah yang wajar dan munasabah pada waktu yang material tersebut.

[16] The autopsy report on all the deceased only pertaining to the cause of death due to head and chest injuries as a result of gunshot wounds.

[17] The defendant submitted for the first to fourth defendant to be vicariously liable provided that the conditions set out in ss 5–6 of the Government Proceedings Act 1956 had been complied with.

[18] The defendants submitted that the plaintiffs claim should be dismissed in accordance s 2 of the Public Authorities Protection Act 1948.

THE TRIALS

Witnesses

[19] The plaintiffs witnesses are:

(a) PW1 – Norhafizah Md Razali, the mother to the first deceased;

(b) PW2 – Hamidah bt Kahar, the mother to the second deceased; and

(c) PW3 – Omar bin Abu Bakar, the father to the third deceased.

[20] The defendants witnesses are:

(a) DW1 – Insp Mohd Azrin bin Izhar, fifth defendant;

(b) DW2 – Koperal Kamarulzaman bin Awang, sixth defendant;

(c) DW3 – Lans Kop Khairul Azhar bin Jali, seventh defendant;

(d) DW4 – ASP Marina bt Hashim, investigating officer;

(e) DW5 – Insp Saipol Paizi bin Zainol;

(f) DW6 – Sarjan Abdul Malek bin Hamid; and

(g) DW7 – Detektif Sarjan Mohd Anwan bin Mohd Tarmizi.

ISSUES

[21] The main issue before this court is whether the fifth to seventh defendants had acted reasonably with reasonable cause in discharging firearms in accordance with lawful and proper procedure that had caused death whereby an act of the torts of assault and battery and/or negligence is said to have been committed against all the deceased. It follows whether the first to fourth defendants are vicariously liable for the act of the fifth to eleventh defendants.

FINDINGS

[22] The plaintiff contended that the defendants were negligent in discharging firearm towards the deceased and committed an act of assault and battery that eventually caused death. The plaintiff submitted that the defendants had failed to take reasonable care to avoid acts or omission which can be reasonably foreseen and likely to injure the deceased. The court is mindful that there is no question that a police officer like anyone else, may be liable in tort to a person who is injured as a direct result of his act or omissions. Thus he may be liable in damages for assault and battery and also for negligence subject to exceptions that reasonable force being used in self-defence or for the prevention of crime. It follows that any intentional or the force is applied recklessly exceeding the ordinary acceptable boundaries, it will suffice to constitute an act of tort. In other words, firearms can only be used in a situation where there is danger of death or grievous hurt to the police officer or any other person's life, see the case of *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

[23] From the evidence adduced, there is no doubt that all the deceased were armed with *parangs* which were later being exhibited as D15A and D15B. The evidences by DW1, DW2 and DW3 were that the deceased had rushed out from their vehicle brandishing the *parangs* with the intention to attack the defendants.

DW1

PC: Inspektor Azrin ya, soalan saya, secara khususkepada ketika kamu telah keluar daripada motorkar, dan kamu kata ada seorang lelaki yang telah keluar dengan pantas memegang sebilah parang. Cerita di situ apa sebenarnya yang berlaku.

A: Selepas kereta saya dilanggar oleh kereta suspek dan kedua-dua buah kereta terbabas di tepi jalan, saya dengan pantas mahu keluar dari kenderaan yang saya naiki untuk melakukan tangkapan dan pemeriksaan ke atas suspek. Namun demikian pada masa yang sama saya keluar dari kenderaan saya, saya dapat lihat di hadapan saya satu lelaki pada ketika itu keluar daripada pintu hadapan kereta suspek itu tadi dan meluru ke arah saya sambil memegang objek parang dan pada masa itu, tujuan saya untuk melakukan tangkapan dan pemeriksaan ke atas suspek itu tadi. Tapi suspek itu tadi dengan pantas meluru ke arah saya sambil memegang meluru ke arah saya yang dilibas-libaskan ke arah saya.

PC: Boleh cerita maksud libas itu? Berapa jauh, berapa panjang. Boleh tunjukkan bagaimana?

A: Suspek ini tadi, dia keluar dari kereta terus memegang parang panjang itu tadi dalam keadaan agresif meluru ke arah saya sambil melibas ke kiri dan ke kanan arah saya.

(refer p 110 of the notes of proceedings)

DW2

PC: Apa yang berlaku selepas itu?

A: Selepas itu, bila saya keluar sahaja, bila saya pergi selepas pintu kereta saya nampak lelaki yang keluar daripada tempat memandu kereta itu meluru dengan memegang sebilah parang dan parang itu diangkat ke atas dilibas ke bawah

(refer p 171 of the notes of proceedings)

DW3

PC: Nanti dulu, kamu kata sebelum keluar kamu nampak diorang keluar dulu.

A: Saya nampak suspek, saya nampak dua orang lah. Benda itu serentak.

PC: Kamu keluar, dia keluar serentak?

A: Ya, mata saya saya ke arah suspek, jadi saya nampak lah.

PC: Baik.

A: Apabila saya nak untuk buat pemeriksaan, suspek telah mengeluarkan sebilah parang sambil meluru ke arah saya dengan melibas-libas dengan agresif.

(refer p 221 of the notes of proceedings)

[24] The evidence showed that the defendants and the deceased were in close proximity of each other when their cars collided and came to a full stop after a dramatic car chase. The court finds that there exist sufficient grounds to raise a

reasonable suspicion in the minds of the defendants that a seizable offence has been committed following the dramatic car chase that empowered the defendants to arrest and entitled to use all means necessary to effect the arrest and capture. The cases of *Ramly & Ors v Jaafar* [1968] 1 MLJ 209 and *Mahmood v Government of Malaysia & Anor* [1974] 1 MLJ 103 is in support of this situation. In *Ramly*'s case the Federal Court held that:

> the question whether there was a reasonable and probable cause must be determined objectively on the evidence before the court and in this case there was reasonable suspicion that the respondent was concerned in a seizable offence and therefore the arrest was not wrongful and the appeal must be allowed.

[25] The evidence by the fifth to seventh defendants that they genuinely feared for their life because of the aggression when the deceased confronted them with deadly weapons.

DW1

PP: Apa yang berlaku?

DW1 : Saya berada dalam keadaan cemas dan takut. Dalam jarak yang hampir dan terancam. Saya nak melarikan diri tak boleh sebab kanan terhalang oleh motokar saya dan belah kiri ada pagar. Jadi kesempatan untuk saya lari tiada. Saya terpaksa keluarkan senjata yang saya ada.

PP: Apa senjata?

DW1: Pistol semi auto. Saya terpaksa lepaskan tembakan pada masa itu.

1. SD2 juga menerangkan bahawa si mati telah melibas-libas parang ke arahnya.

DW2

PP: Apa yang berlaku selepas itu?

DW2: Saya nampak dia meluru dengan parang. Parang diangkat ke atas dan dilibas-libas ke bawah.

During cross-examination — DW3

DW3: Apabila saya keluar untuk pemeriksaan, saya nampak suspek keluar secara serentak. Mata saya ke arah suspek jadi saya nampak. Bila saya nak buat pemeriksaan, suspek telah melibas parang kiri ke kanan. Saya merasa diri terancam jadi saya lepaskan tembakan.

During re-examination — DW3

DC: Bila suspek meluru, kamu jawab tak da peluang untuk lari. Dalam keadaan sebegitu, apa tindakan yang paling wajar kamu lakukan apabila nampak suspek meluru ke arah kamu?

DW3: Pada masa itu saya tidak ada kesempatan untuk melarikan diri kerana jarak terlalu dekat dan ancaman betul-betul boleh membahayakan nyawa saya. Jadi saya terpaksa melepaskan tembakan.

[26] The court is of the view that in the agony of the moment fearing for their life or otherwise grievous hurt likely to be inflicted, the fifth to seventh defendants need not wait for the injury to be inflicted on them first before they can react. In this instance they had no choice but to fire the shots at the deceased to protect themselves. Having taken into account of the facts, the dramatic car chase and the deceased act of rushing out from the car armed with *parangs*, the court finds that there are credible evidences to show that the defendants' were threatened that could likely have resulted to loss of their life or otherwise could cause grievous hurt. The defendants were under a reasonable apprehension that their death would otherwise be the consequences if they had not fired the shots at the deceased. The defendants were consistent in their evidence and corroborative of each other in that they have reasonable cause to open fire on the deceased as a last resort in self defence. In this case, the court finds that the defendants were merely exercising their legal rights of self defence and the question of being negligent does not arise at all since they had a reasonable and probable cause to open fire at the deceased.

[27] In the case *Ya bin Daud v Public Prosecutor* [1997] 4 MLJ 322; [1996] 2 CLJ 540, the court states that:

> Together they attacked the appellant, and the appellant being alone and cornered in his own compound and coupled with the crying of his wife, I find that at that point of time, the appellant had more than a reasonable apprehension of death or grievous hurt at the hands of the deceased and SP10. He need not wait till he receives a grievous injury before he can exercise his right of private defence. There was no way out for the appellant to escape as he was surrounded by SP10, the deceased and SP8. He was entitled to defend himself the best way he could.

[28] In another case of *Patrick Chau Fook Henn v Public Prosecutor* [2014] 3 MLJ 825; [2014] 8 CLJ 14, the Court of Appeal held that:

> The trial judge referred to four critical justifications that must be met before the plea of self-defence could succeed ie: (a) the accused must be free from fault in bringing about the encounter; (b) there must be present an impending peril to life or of great bodily harm either real or so apparent; (c) there must be no safe or reasonable mode of escape by retreat; and (d) there must have been necessity of taking life ...
>
> In law, use of force is allowed only when it is absolutely necessary in self-defence. Though the law does not require an accused to run away when he is being attacked, there is an obligation on the part of the accused to make an effort in any reasonable manner to get himself out of danger from the attack. The justification for use of force in retaliation is available only in situations where the accused was cornered and there is no possible way of escaping from the attack except to retaliate by using whatever necessary force that is required for the purpose of self-defence.

[29] While in the case of *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188; [1965] 1 LNS 45, the High Court states that:

> ... that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence ...

[30] The court is satisfied that the defendants were under reasonable apprehension that their death would otherwise be the consequence if they had not fired the fatal shots. Thus, the defendants was not negligent but had so acted in the agony of the moment that the defendants were free from fault in bringing about the encounter during an impending peril to life or of great bodily harm either real or so apparent and there is no safe or reasonable mode of escape by retreat where the defendants have no room except having the necessity of taking life. Since the defendants were merely exercising their legal rights of private defence with reasonable force, the question of being negligent does not arise at all.

[31] The plaintiff also contended that the autopsy reports of all the deceased have shown that they were shot at a 45 degree and or downward angle showing that the gunshots were not fired from the front. The plaintiffs' witnesses concluded that it is an execution style killing by the defendants. However, it is insufficient for the court to rely on the plaintiff's witnesses (who are the families of the deceased) and the autopsy report to support the plaintiff's supposition. In determining and concluding such supposition the court is of the view that expert witnesses — weapon or forensic expert who is the maker of the autopsy report — should be called to explain as to how such a shooting angle of 45 degree; the physical attributes of defendants — the three shooters and the deceased; the position and distance where the bullets were fired from and the likelihood of crossfire that point to the only conclusion that the shooting was an execution style of killing. The opinions of experts are admissible to furnish the court with scientific information which is unlikely to be within the experience and knowledge of a judge — s 45(1) of the Evidence Act 1950. The court is mindful that where the expert evidence is required on technical matters such as in this case, the court should not decide on such matters in the absence of such evidence. In *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 (FC) held that:

> It is settled principle that while it is true that a judge who sits alone is entitled to weight all the evidence, to put his own magnifying glass to determine the probabilities so as to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.

In the case before this court, the autopsy report only describes the gunshot injuries resulting from the shooting and the cause of death but it was the plaintiff who had made their own inferences that the shooting was an execution style of killing without adducing evidences to prove and support their contention.

[32] The plaintiff contended that the defendants' version of the shooting incident is inherently incredible because the sequence of events recounted by the defendants is far-fetched and highly improbable. The sequence of event and the similarities in the testimony of the defendants indicates that their story had been fabricated. There is no reason for the court not to accept nor even doubts the testimony of the defendants even though their evidences were identical narrative and to certain extent had parroted the sequence of events because there is no sufficient evidence to establish the deliberate dishonest on the part of the defendants. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidences very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[33] In the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; [1976] 1 LNS 184, Raja Azlan Shah (as His Majesty then was) had this to say on witnesses discrepancies:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[34] Having considered the evidence adduced by the fifth to seventh defendants in totality, the court finds that the evidences of the defendants to be credible and believable. The identical narrative and to certain extent had parroted the sequence of events are not the ground which require this court to reject their evidence in toto.

[35] The court also is unable consider the contention that the manner in which the defendants discharged their firearms was in flagrant breach of the inspector general's standing orders ('the IGSO') because it was never been adduced as evidence but was raised only during the plaintiffs' submission. Under s 103 of the Evidence Act 1950, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. It is a trite law that in this present case, the burden of proving is on the plaintiffs where they had failed to do so.

[36] The evidence adduced by the plaintiffs' witnesses only about the news as to the death and the good characters and behaviour of the deceased. No evidences were adduced to prove that the defendants were in excess of statutory duties or inappropriate manner when discharging their firearm. The court finds that since the fifth to eleventh defendants were not liable for assault and battery; public misfeasance or otherwise for negligence, the first to fourth defendant were not vicariously liable as pleaded by the plaintiffs.

[37] Having heard the evidences before me and submissions from both learned counsel and after having given much consideration, I, on the balance of probabilities, finds that the plaintiff's claims against the defendants is dismissed with costs.

[38] Costs RM20,000

Plaintiffs' claim dismissed with costs of RM20,000.

Reported by Dzulqarnain Ab Fatar